78-1226

Supreme Court, U. S.
FILED
FEB 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1226

FREDERICK J. OTTERBEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The Petitioner, Frederick J. Otterbein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on December 8, 1978.

OPINION BELOW.

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit appears in the Appendix hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 8, 1978. A timely petition for rehearing was denied on January 9, 1979, and this petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether it is plain error to permit expert opinion testimony on and to charge the jury with the resolution of the central question of law, namely whether the corporate savings account from which the Petitioner made withdrawals was an "employee benefit plan" or a "fund con-

nected therewith" within the meaning of 18 U. S. C. § 664 and 29 U. S. C. § 1002.

2. Whether, absent a proper legal determination that the corporate savings account from which the Petitioner made withdrawals was an "employee benefit plan" or a "fund connected therewith", there was any evidence to support his conviction.

3. Whether 18 U. S. C. § 664, as applied to the facts of this case, is void for vagueness.

4. Whether a trial judge must voir dire the jury to determine whether it had been exposed to publicity during trial which the judge himself finds erroneous and inadmissible.

5. Whether it was plain error for the judge to solicit oral questions from the jury and respond thereto without prior consultation with counsel.

STATUTES INVOLVED.

18 U. S. C. § 664 provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.
>
> As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

29 U. S. C. § 1002(1)-(3) provide:

> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program

> which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).
>
> (2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (A) provides retirement income to employees, or
>
> (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

STATEMENT OF THE CASE.

On June 22, 1977, the Petitioner was charged in an eight-count superseding indictment with violations of 18 U. S. C. § 664. The indictment charged that the Petitioner had made eight separate unlawful withdrawals from a corporate savings account maintained by Universal Enterprises, Inc. ("Universal") at the First Federal Savings & Loan Association of Charleston, South Carolina ("First Federal Account"). This account was alleged to be an "employee pension benefit plan and a fund connected therewith."

The case was tried in the United States District Court for the District of South Carolina before the Hon. Charles E. Simons, Jr., and a jury. The court denied the Petitioner's motions for judgment of acquittal and submitted the case to the jury which returned a verdict of guilty on all eight counts of the indictment. The court denied Petitioner's motions for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial. The judgment of conviction was affirmed by a Panel of the United States Court of Appeals for the Fourth Circuit.[1]

The record reveals the following facts which are germane to this petition:

Universal is a South Carolina corporation engaged in the maintenance and repair of containers used to transport containerized cargo. Initially, although a 51% shareholder, Petitioner was employed by another company and was not engaged in the day-to-day management of Universal's business. In the spring of 1976, he became active

1. At the trial of the case, Petitioner was represented by counsel from Charleston, South Carolina. On appeal, to the Court of Appeals for the Fourth Circuit and on this petition, he is represented by William J. Rodgers, a member of the firm of Pepper, Hamilton & Scheetz, 2001 The Fidelity Building, 123 South Broad Street, Philadelphia, Pennsylvania 19109 and 1776 F Street, N. W., Washington, D. C. 20006.

in managing the company's financial affairs and was elected president, replacing John Bevon, who left Universal for other employment in the fall of 1976 (Tr. 680, 683, 684, 686).

In the spring of 1976, Universal was confronted with competition on the Charleston docks from a company with employees represented by the International Longshoremen's Association ("ILA"). The ILA also represented the employees of many of Universal's customers and, apprehending that Universal might lose business were it not to become a union shop, Petitioner and Bevon sought to have Universal's employees represented as well by the ILA. After inquiries with the president of Local 1422A in Charleston and ILA officials in New York, Bevon was presented with a standard-form Collective Bargaining Agreement by Robert L. Bateman, the president and business representative of Local 1422A (Government Exhibit ["GX"] 244). This Agreement, drafted by the union's lawyers in New York, was virtually identical to other ILA collective bargaining agreements (Tr. 123).

The text of the Agreement provided, *inter alia,* that Universal would become a party to the National International Longshoremen's Association Employers' Trust Fund, a pension plan administered by the Prudential Insurance Company ("Prudential Plan") (Tr. 155). Before the Agreement was executed, however, Local 1422A sought but was denied admission to the Prudential Plan and was required instead, along with other ILA locals in the south, to establish a separate pension and welfare trust fund (Tr. 125, 126). Local 1422A then undertook negotiations with the Travelers Insurance Company, as well as other steps to establish a separate pension and welfare trust fund prior to the execution of the agreement with Universal (Tr. 138-146). It is uncontroverted, however, that a new pension and welfare trust fund was not established as of the time

that Universal executed the Collective Bargaining Agreement with Local 1422A, nor had such a fund been established as of the time of the trial of the Petitioner (Tr. 138-146).

After learning that the Prudential Plan was not open to Local 1422A and before executing the agreement, Bevon asked Bateman how Universal should handle the money for the pension and welfare contributions required by the text of the agreement (Tr. 122, 123). Bateman, in reply, stated that Universal should keep the money until the union called for it (Tr. 123) and that the union would not call for it until the new pension and welfare trust fund was established (Tr. 126).

Having thus received no definite advice for handling the money (Tr. 195, 209) and having been advised that the union did not want the money until the proposed trust fund was established, Bevon took several steps with an eye toward the day when a new pension and welfare plan would be established and the union would call for Universal's contributions. He instructed the payroll department at Universal to calculate the amount of pension and welfare contributions and to prepare so-called recap sheets indicating the amount of such contributions as Universal would be required to pay for each employee and also the amount of union dues deducted from each employee's paycheck. The recap sheets were then sent to the appropriate union offices along with a check for the appropriate union dues (Tr. 195-197). The money which was set aside for the proposed pension and welfare contributions was, of course, not remitted to the union, because Universal had been advised that the union did not want it. Instead, Bevon directed that this money be deposited in a corporate savings account which he opened at the First Federal Savings and Loan Association of Charleston, the First Federal Account (Tr. 197-199).

Initially, Bevon and a clerical employee of Universal were the only persons authorized to make withdrawals from the First Federal Account (Tr. 199), but in the summer of 1976, as Bevon contemplated leaving Universal and the Petitioner became actively involved in the company's operations, the signature cards were changed, and the Petitioner was designated as an authorized representative of Universal for purposes of that account (Tr. 201).

It was not disputed at trial that Universal recognized an obligation to contribute to a multi-employer pension and welfare trust fund at such time as the new fund was established. Nor was it disputed at trial that the Petitioner directed that eight withdrawals be made from the First Federal Account. What was disputed, however, was the characterization of the First Federal Account itself.

As the basis for its prosecution of the Petitioner, the Government contended that the First Federal Account was an "employee pension benefit plan" or a "fund connected therewith" as defined in 18 U. S. C. § 664.[2] The basis for this contention, however, was the expert opinion of a Department of Labor official, J. Vernon Ballard. Mr. Ballard described ERISA at length and testified with respect to its purpose (Tr. 305-314). He was then asked to make a number of assumptions which were supported by evidence in the record, much of it undisputed, and which described the First Federal Account and the circumstances under which it was established (Tr. 314-318). Finally, in re-

2. 18 U. S. C. § 664 incorporates by reference Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). Thus, proper construction of 18 U. S. C. § 664 requires reference to Title I of ERISA, specifically § 3(1)-(3) ("Definitions"), 29 U. S. C. § 1002(1)-(3), set forth *supra*. In addition, the Department of Labor has issued regulations, 29 C. F. R. §§ 2510.3-1, -2, -3 (1977), in an effort to define the concept of "employee benefit plan" and has established an "information letter" and "advisory opinion" procedure, ERISA Proc. 76-1, 41 F. R. 36281-36283 (Aug. 27, 1976) to lend further assistance by way of comprehending this legislation.

sponse to a hypothetical question based on those assumptions, Mr. Ballard testified that, in his expert opinion, the First Federal Account was subject to ERISA (Tr. 318-329).[3]

In addition to Mr. Ballard, one other Government witness, Thomas W. Messerby, a former employee of Universal, gave testimony which is relevant to the issues in this petition. Mr. Messerby testified that he had made inquiries while employed by the company with respect to the proposed pension plan and that he had been fired after one year with the company (Tr. 348-357). At the conclusion of redirect examination, and just before he left the stand, the court inquired into the circumstances under which he had been discharged:

> The Court: Was this before or after you were inquiring about your pension funds?
>
> Answer: It was after.
>
> The Court: All right, you may step down.
>
> (Tr. 357)

Mr. Messerby's testimony became the subject of television and newspaper publicity which counsel for the Petitioner brought immediately to the attention of the trial judge (Tr. 363). He showed the judge an article in the morning press to which the judge responded:

3. Mr. Ballard was asked to assume, for example, that the First Federal Account was opened under the employer's exclusive control; that the Collective Bargaining Agreement required the employer to make pension contributions; that the employer considered itself bound to the terms of the agreement; that money was deposited in the Account by the employer at the rate prescribed in the Agreement; that the employer made reports to the union; and that the employer claimed federal and state tax deductions.

Defense counsel objected to Mr. Ballard's testimony in some respects, but not in others, although it is difficult to see the difference between those to which he objected and those to which he did not (Tr. 289-296). In addition, to combat the effects of Mr. Ballard's testimony, Petitioner introduced his own expert testimony.

> This is completely erroneous. "Longshoremen's Association union member testified in the United States District Court Tuesday that he was fired from his job at Universal Enterprises after he inquired about pension fund which he believed had been depleted". That is completely erroneous. (Tr. 377)
>
> * * *
>
> "The February 7th article in the *New York Times* reported that the association's Bateman, one of several ILA officials under federal investigation for receiving direct pay"—*this is all stuff that the jury shouldn't see* and there is no evidence in this case or . . . (Tr. 377) (emphasis added)

At numerous points throughout a lengthy discussion between counsel and the court, the judge openly regretted having engaged in the colloquy with the witness, expressed his gratitude to counsel for having brought the matter to the court's attention, promised to refrain from engaging in further such exchanges with witnesses, and solicited the advice of counsel respecting action which he might take to correct possible harm generated by his colloquy with the witness (Tr. 366, 368, 369, 370, 372, 378, 386). At no time, however, did he suggest corrective action with respect to the newspaper and television publicity nor did he invite suggestions for such corrective action. Finally, he did not *voir dire* the jury to ascertain the extent of prejudice which may have been caused by the newspaper and television publicity.

In his charge to the jury, the judge included explicit instructions that it was for the jury to determine whether the First Federal Account was an "employee benefit plan" within the purview of Title I of ERISA or whether it was a fund which was connected with such a plan (Tr. 793, 794, 796-797). The judge reviewed the language of 18 U. S. C. § 664 and 29 U. S. C. § 1002; he called the jury's attention

to the "surrounding circumstances", 29 U. S. C. § 1002(2); he listed, by way of illustration, a variety of factors which the jury "may", but was not required to consider in making its determination; [4] and, adding to those factors suggested by way of illustration, he called the jury's attention to the opinion testimony of the expert witnesses:

> Ten, you may also consider the expert opinions and conclusions of the expert witnesses as to the nature and character of the fund in question in determining whether an ERISA plan was created or whether a fund was set aside which was connected with such a pension plan subject to ERISA. (Tr. 800) [5]

After the jurors had deliberated approximately five hours, the judge recalled them to the courtroom and inquired whether they were making progress in arriving at a verdict in the case (Tr. 841). When the foreman responded that the jury was in fact not making any progress at all, the judge delivered a modified version of the *Allen* charge as follows:

> Now, while you are here, I'll just merely say this. This case, of course, has taken the better part of the week to actually try and with your deliberations it has been a week, and this, of course, the trial is expensive insofar as the prosecution is concerned and insofar as the defendant is concerned. It's time consuming and expensive and what the situation would develop into if you are unable to arrive at a verdict it simply means that at some point in time after further deliberation, of course, that it would be my duty to declare a mistrial.

4. These factors were closely parallel to the factual assumptions which the Government's expert witness Mr. Ballard had been asked to make as a basis for his opinion that the First Federal Account was subject to ERISA.

5. We note that counsel for the Petitioner did not object to this part of the charge.

> That would mean that at a later date the same case with substantially the same type of evidence, probably the same attorneys, with a different jury and hopefully with a different judge, this case would have to be tried again. Now, I have every confidence in this jury that you are just as capable, just as competent to decide this case from the evidence presented to you as any other twelve people that we might assemble to try the case. So I do want you to go back into your jury room and resume your deliberations and be sure that you have made an earnest and determined effort to arrive at a fair verdict in this case, and I would ask you to continue on (Tr. 842).

At the very end of his delivery of the *Allen*-type charge, the court took the unusual step of soliciting oral questions from the jurors:

> Before you go [back to the jury room] I would ask you if any legal matter, any legal question is bothering any of you. Of course, I can't assist you insofar as your factual determinations because that's within your sole province, but if any, if there is any help that the Court could give you in reference to any legal matter that may be worrying you I surely will be glad to do that (Tr. 842-43).

In response to this solicitation, one juror requested the opportunity to speak and was permitted to do so:

> We are confronted with the difficulty of trying to interpret whether the actual signing of the contract between Universal and the Longshoremen's automatically constituted a binding, established, indisputable commitment on the part of Universal to escrow its funds in the proper sense of the word

versus simply Universal's taking the position that it is responsible ultimately for payment of this money at such time as it may be called for (Tr. 843).

* * *

I don't think, the confusion we keep thrashing is at what point does ERISA automatically, according to Title I, whatever that is, at what point does it automatically . . . (Tr. 845).

* * *

Well, I'm referring to ERISA as a complicated thing and I'm simply saying that the thing we keep coming back to is at what point does ERISA, does the jurisdiction of ERISA, does it . . . (Tr. 845).

Before counsel had any real opportunity, either to object or to advise the court respecting the proper response to the juror's questions, the court immediately engaged in a colloquy with the juror, repeating the charge to the jury to make the determination whether the First Federal Account was a plan or fund connected therewith, within the meaning and protection of 18 U. S. C. § 664 and 29 U. S. C. § 1002 (Tr. 843-848), and, once again, the judge called attention to the expert opinion testimony of Mr. Ballard, describing its purpose as a clarification of the law:

> The prosecution brought an expert witness here to, and qualified him as an expert, to express his opinion and to answer or to at least try to clarify the law for us and assist us in this matter (Tr. 847).

After further deliberation, the jury returned a verdict of guilty on all eight counts of the indictment.

REASONS FOR GRANTING THE WRIT.

I. The Panel's Opinion With Regard to the Expert's Testimony and the Charge to the Jury Is in Conflict With a Closely Analogous Case in Another Circuit.

In its Opinion, the Panel agreed with the Petitioner that the Government's expert witness should not have been permitted to opine whether the First Federal Account was a plan or fund protected by 18 U. S. C. § 664. The Panel, however, did not find the error reversible. It reasoned that there was no objection to Mr. Ballard's opinion testimony, that the Petitioner's expert was permitted to express a contrary conclusion, and that, in the Panel's opinion, Mr. Ballard correctly stated the law. In addition, the Panel observed:

> Certainly there was ample evidence, aside from the expert's testimony, from which the jury could find that the withdrawals were made from a protected fund and hence were in violation of § 664. Slip Op. at 2.

The Panel's refusal to find plain error is in conflict with the closely analogous case of *United States v. Guterma,* 281 F. 2d 742 (2d Cir.), *cert. denied,* 364 U. S. 871 (1960) (Friendly, Cir. J.). There, the defendants were charged with a knowing and willful failure to disclose information, pursuant to the Securities Exchange Act of 1934, with respect to the disposition of a "significant amount" of assets, which was defined in an SEC instruction by reference to the " 'net book value' of such assets". *Id.* at 750. The trial judge left it to the jury, as the ultimate triers of fact, to interpret the concept of "net book value", and, in so doing, to take into account the testimony of expert witnesses to which there was no objection.

On appeal, however, the Second Circuit ruled that the trial judge had given to the jury "a task properly his own, namely, the interpretation of the term 'net book value' in SEC Instruction 4 as applied to a pledge of securities." *Id.* at 751-52. *Guterma* is directly apposite to the case at hand. In both cases, there was a threshold legal issue of statutory construction (there, whether the defendants disposed of a "significant amount" of assets, defined by the "net book value" thereof, and here, whether the First Federal Account could properly be defined as an employee benefit plan subject to the provisions of ERISA or a fund connected therewith), and in each instance, the court gave the jury a task which was properly his own.[6]

The admission of the improper expert testimony on this important question of law was highly prejudicial for several reasons. First, the question of whether the First Federal Account was a plan or fund protected by 18 U. S. C. § 664 was a constant source of confusion and ambiguity which tainted the trial of the Petitioner from beginning to end. It was the source of a fundamental error in the charge which the judge gave to the jury. It complicated the jury's deliberation, and set the stage for an *Allen*-type charge. And it was the main topic of discourse in a colloquy which the trial judge conducted with one juror after delivery of the *Allen*-type charge.

Second, throughout the trial, both the judge and the jury referred to Mr. Ballard's testimony as authority for a resolution of the paramount issue of law in the case. For example, the judge stated:

6. The Panel's opinion that the evidence sufficed to support a jury finding of a protected fund is at odds with its opinion respecting the propriety of the expert's opinion testimony. If it was improper for the expert to testify that the First Federal Account was a protected fund because, in the Panel's opinion, that testimony encompassed a conclusion of law, it was similarly improper for the judge to charge the jury with a resolution of precisely the same legal issue.

> Frankly, to tell you the truth, I never heard of ERISA before and they brought that man [Mr. Ballard] down here and I thought he was a good witness, and I guess he helped us all understand what the law is. (Tr. 382)

And, during its deliberations, the jury sent a note to the judge with two questions, one of which read:

> No. 1, on signing the union contract whether or not an official fund (plan) existed to which the pension contributions should be sent, would an employer according to the law as explained by Mr. Ballard have the automatic fiduciary responsibility to maintain that money physically intact? (Tr. 822-23)

By permitting expert opinion testimony on the central issue of law in the case and charging that the jury with its resolution, the trial judge committed plain error. The refusal by the Panel of the Fourth Circuit to reverse is in conflict with Judge Friendly's opinion in the *Guterma* case, and the prejudice which the Petitioner has suffered justifies intervention by this Court.

II. The Panel's Opinion That the Government Sustained Its Burden of Proof Is in Conflict With an Analogous Case in Another Circuit and With Analogous Cases in This Court.

In holding that the evidence sufficed to support a jury finding of a plan or fund protected by 18 U. S. C. § 664, the Panel rejected Petitioner's argument that, absent a proper legal determination that the First Federal Account was such a protected plan or fund, the record was devoid of evidence to support the conviction of the Petitioner.

The Panel's decision is again in conflict with Judge Friendly's *Guterma* decision. There, the Second Circuit

held that the Government had failed to carry its burden of proving that the defendants had knowingly and willfully violated an SEC requirement that they report a disposition of assets whose "net book value . . . exceeded 15% of the total assets of the registrant and its consolidated subsidiaries, . . .", *United States v. Guterma, supra,* 281 F. 2d at 750 n. 4. Having first determined that the threshold legal issue (whether the defendants had disposed of a "significant amount" of assets as defined by the concept of "net book value" thereof) was a matter of statutory construction which should have been decided by the court, rather than submitted to the jury, Judge Friendly proceeded to hold that the Government had failed to meet its burden of proving a disposition of a "significant amount" of assets, notwithstanding that the Government had introduced "expert" testimony that a "significant amount" of assets had been disposed of. He concluded:

> There was thus no basis for a finding that the violation of the 8-K reporting requirement, if any there were, was knowing and willful; *Id.* at 752.

In the case at hand, as in *Guterma,* the court improperly submitted to the jury the threshold legal issue of whether the First Federal Account came within the statutory definition of an employee benefit plan or a fund connected therewith. Here, too, the Government failed to meet its burden of proving the existence of a protected plan or fund and merely assumed that the question would be resolved by the introduction of its expert's opinion testimony. There is thus no basis for a finding that the Petitioner embezzled, stole, or unlawfully and willfully abstracted or converted from such a plan or fund connected therewith.

The conviction of the Petitioner on the basis of a record which, absent the self-serving testimony of one of

the Government's own employees, is devoid of evidence that he committed acts within the reach of the criminal statute he is charged with violating, is a deprivation of due process of law. This point is made clear in a series of decisions in this Court in which criminal convictions, unsupported by any evidence in the record except the "opinion" of a particular law enforcement official, have been overturned. In each instance, the Court made the initial determination that, as a matter of law, the acts which the defendants had committed were not proscribed by the respective criminal statutes they had allegedly violated. The Court then proceeded to a factual determination that the record was barren of evidence to support a finding that the defendants had committed acts which were within the coverage of the statutes.

In *Johnson v. Florida,* 391 U. S. 596 (1968), for example, the defendant was charged with violating a Florida vagrancy statute which made it a misdemeanor to be found "'wandering or strolling around from place to place without any lawful purpose or object'", *id.* at 596, notwithstanding that the evidence on the record demonstrated only that he had been sitting at a bus stop. Because, as a matter of law, sitting was not within the prohibitions of the Florida vagrancy statute, and because there was no evidence to demonstrate that he was doing the acts which were prohibited, namely, "wandering or strolling", the Court held that such a conviction was therefore in violation of due process of law. *See Garner v. Louisiana,* 368 U. S. 157 (1961) (record totally devoid of any evidence that defendants had committed violent or boisterous acts which would have violated Louisiana "disturbing the peace" statute and revealed only that they were sitting peacefully in a restaurant, conduct which, as a matter of law, did not violate Louisiana statute—held, convictions so devoid of evidentiary support violated due process of

law); *Thompson v. City of Louisville*, 362 U. S. 199 (1960) (conviction on the basis of record which contained no evidence that defendant was guilty of conduct proscribed by Kentucky "loitering" and "disorderly conduct" statutes and which revealed only that he had engaged in conduct not within the reach of those statutes, violated due process of law).

Because, in the instant case, there was never a proper legal determination that the First Federal Account was a plan or a fund within the meaning of the relevant legislation, there was no basis for a factual finding that the Petitioner embezzled, stole, or willfully and unlawfully abstracted or converted funds or assets which enjoyed the protection of that legislation. His conviction, for violation of 18 U. S. C. § 664, was therefore so totally devoid of evidentiary support that it offends principles of due process.

III. The Panel's Judgment That 18 U. S. C. § 664, as Applied to the Facts of This Case, Is Not Void for Vagueness Should Be Re-Examined in Light of *Colautti v. Franklin*, 47 U. S. L. W. 4094 (U. S. Jan. 9, 1979).

In its decision, the Panel ruled that 18 U. S. C. § 664 was not "void for vagueness" because it "does not fail to give a person of ordinary intelligence fair notice of proscribed conduct." Slip Op. at 3. This Court's decision last month in *Colautti v. Franklin*, however, requires a re-examination of the Panel's ruling.

First, in *Colautti*, this Court added new clarity to the test for "void for vagueness" and has now indicated that the standard is two-pronged. Thus, "a criminal statute that [1] 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' . . . or [2] is so indefinite that 'it encourages

arbitrary and erratic arrests and convictions,' . . . is void for vagueness." 47 U. S. L. W. at 4097. In its ruling, therefore, the Panel considered only the first, but not the second basis for a determination that 18 U. S. C. § 664, as applied to the facts of this case, was sufficiently clear to pass constitutional muster.[7]

Second, in *Colautti*, this Court held Section 5(a) of the Pennsylvania Abortion Control Act unconstitutional. Section 5(a) of that Act required every person who performed or induced an abortion to make a determination, " 'based on his experience, judgment or professional competence' ", that the fetus was not viable. 47 U. S. L. W. at 4097. In holding Section 5(a) unconstitutional on the ground that it was "void for vagueness", this Court reasoned, *inter alia*, that the viability determination was itself a matter of uncertainty and that "even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all." *Id.* at 4099.

The instant case is quite similar. Section 664 protects "any employee welfare benefit plan or employee pension benefit plan or . . . any fund connected therewith,". It then defines " 'any employee welfare benefit plan or employee pension benefit plan' " in rather circular fashion to mean "any employee benefit plan subject to any provision of Title I of the Employee Retirement Income Security Act of 1974." Section 3 of Title I of ERISA, 29 U. S. C. § 1002, which purports to define the relevant terminology of ERISA, merely restates § 664, only in reverse, by providing that the "term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee

7. In his appeal to the Fourth Circuit Petitioner did in fact contend that 18 U. S. C. § 664 encouraged arbitrary and erratic prosecutions. Brief For Appellant at 25.

pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U. S. C. § 1002(3).

Moreover, the "surrounding circumstances" language of § 1002(2), which purports to define the terms "employee pension benefit plan" and "pension plan", is a concession, on the very face of the statute, that whether certain funds come within the coverage of the Act will depend on "surrounding circumstances" which are not capable of sufficiently concrete identification to be incorporated into the language of the statute itself and whose uncertainty is therefore fatal for purposes of a criminal law. These definitional difficulties are illustrated yet further by the regulations which the Department of Labor has felt compelled to issue with respect to this very problem, 29 C. F. R. §§ 2510.3-1, -2, -3, and by the establishment of an "information letter" and "advisory opinion" procedure for the very purpose of clarifying precisely the kind of question which has arisen in this case.

Mr. Ballard's improper expert testimony illustrates the problem well. First, Mr. Ballard was asked to make certain factual assumptions which purported to provide the "surrounding circumstances" from which he drew his legal conclusion that the First Federal Account was a protected fund or plan. Nowhere, however, do these factual components appear on the face of the legislation or in the Department of Labor's regulations. In fact, they do no more than suggest what, in Mr. Ballard's judgment, are the attributes or indicia of a protected plan or fund. Just as in *Colautti* different physicians equate viability with different probabilities of survival, in the instant case different legal and tax experts could equate a protected fund or plan with different attributes or indicia. What Mr. Ballard's testimony attempted to accomplish, therefore, was to read the attributes or indicia which he deems to be

relevant into 18 U. S. C. § 664 in a belated effort to provide clarity to an otherwise impermissibly vague statute.

Second, Mr. Ballard was asked to construe the meaning of ERISA in light of the attributes or indicia which he had read into the statute in the course of his expert testimony and to opine whether the First Federal Account was a protected plan or fund within the meaning of the law. A statute which requires this type of elucidation, namely an opinion as to whether it is violated, is not sufficiently definite to proscribe criminal conduct. Such a statute does not provide a person of ordinary intelligence with fair notice that, if he were to withdraw funds from an account such as the First Federal Account, he is guilty of conduct which may be punished criminally. Moreover, if the application of 18 U. S. C. § 664 passes constitutional muster in this case, the Government may be encouraged to bring prosecutions, for violation of that statute, on an erratic and arbitrary basis. A determination which depends on "surrounding circumstances", on a complex process of interpretation and clarification through the Department of Labor and ultimately on an opinion rendered by a Governmental official, would provide fertile ground for the Government to pick and choose its targets without any necessarily discernible pattern or principle of selection.

For these reasons, *Colautti v. Franklin* requires a reappraisal of the Panel's decision in the instant case.

IV. The Panel's Ruling With Respect to the Trial Court's Failure to Voir Dire the Jury After Learning of Prejudicial Publicity During Trial Is in Conflict With Other Cases in the Fourth Circuit Itself as Well as Several Other Circuits.

The Panel ruled that the trial judge had not erred in failing to voir dire the jury after prejudicial publicity was brought to his attention during the trial. The Panel rea-

soned, first, that the publicity was not prejudicial because "the newspaper article reported only what the jury had heard in open court and it drew an inference that the jury was entitled to draw." Second, "despite repeated invitations from the district court to counsel to make suggestions as to corrective action, counsel declined to request the court to do anything." Slip Op. at 3. In so ruling, however, the Panel premised its decision, first, on factual assumptions directly contrary to the facts in the record and, second, on a legal principle which departs from prior decisions of its own circuit and conflicts with several other circuits as well.

First, the trial judge himself determined that the publicity encompassed material which was erroneous and irrelevant, which had in fact not been introduced into evidence in court, and which, in any event, the jury ought not to see.[8] Thus, the material contained in the newspaper article fell squarely within the definition of "substantial prejudicial material" set forth in a previous Fourth Circuit decision, *United States v. Jones*, 542 F. 2d 186, 195 (4th Cir. 1976), *i.e.*, " 'information about the defendant that would not be admissible before the jury or that was not in fact put before the jury in court.' "[9] *Id.* Furthermore, although the trial judge solicited suggestions for corrective action with respect to the colloquy which he had conducted with the witness, Mr. Messerby, and which became the occasion for the publicity in question, the record reveals that, at no time, did the trial judge solicit suggestions for corrective action with respect to the newspaper publicity, contrary to the factual assumption made by the Panel (Tr. 363-387).

8. The judge's statements on the record with respect to this very point are set forth in our Statement Of The Case.

9. *Accord, United States v. Perrotta*, 553 F. 2d 247, 250 n. 7 (1st Cir. 1977) ("The cases distinguish between publicity which reports fairly accurately on what took place in court before the jury and publicity which deals with matters not brought to the jury's attention in open court." [citations omitted])

Second, the ruling by the Panel is a departure from prior decisions of the Fourth Circuit itself and is in conflict with authority in other circuits as well. In *United States v. Hankish*, 502 F. 2d 71 (4th Cir. 1974), the court stated, quoting with approval from a Seventh Circuit case as follows:

> "Thus, the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court *must ascertain* if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further." *Id.* at 77 [emphasis added by the Fourth Circuit to the quotation from *Margoles v. United States*, 407 F. 2d 727, 735 (7th Cir.), *cert. denied*, 396 U. S. 833 (1969)]
>
> * * *
>
> We agree with the Seventh Circuit that when highly prejudicial information may have been exposed to the jury, the court must ascertain the extent and effect of the infection and thereafter, in its sound discretion, take appropriate measures to assure a fair trial. *Id.* at 77.

The Fourth Circuit repeated the admonitions of *Hankish* in *United States v. Pomponio*, 517 F. 2d 460, 463 (4th Cir.), *cert. denied*, 423 U. S. 1015 (1975). Similarly, cases in six other circuits take the position that the

trial judge has an affirmative obligation to take positive action to ascertain the existence of improper influences on the jury's deliberations and to take whatever steps are necessary to eradicate such improprieties. *See United States v. Herring*, 568 F. 2d 1099, 1104-05 (5th Cir. 1978); *United States v. Lord*, 565 F. 2d 831, 838 (2d Cir. 1977); *United States v. Perrotta, supra*, 553 F. 2d at 249-50; *Silverthorne v. United States*, 400 F. 2d 627, 641, 643 (9th Cir. 1968); *Mares v. United States*, 383 F. 2d 805, 808-09 (10th Cir. 1967), *cert. denied*, 394 U. S. 963 (1969). *Cf. United States v. Vento*, 533 F. 2d 838, 869 & n. 106 (3d Cir. 1976). The language in these decisions insists that it is the judge's duty to make the necessary inquiry and that he must do it.[10]

Because the problem of prejudicial publicity is so sensitive and because the Panel's decision creates a conflict, not only with other circuits, but also within its own circuit, the intervention of this Court is required.

V. The Judge's Solicitation of Oral Questions From the Jury and Response Thereto Without Prior Consultation With Counsel Conflicts With the Practices Suggested by This Court and by Other Authorities.

The judge's solicitation of oral questions from the jury and colloquy with the one juror which we set forth in our Statement Of The Case was fraught with substantial prejudice to the Petitioner. The solicitation of questions was an unusual departure from the normal practice of waiting for the jury first to contact the court by means

10. In *Silverthorne v. United States, supra*, counsel asked the court to declare a mistrial, but actually declined an offer to voir dire the jury. Nevertheless, the Ninth Circuit ruled that the judge should have made the necessary inquiry to determine what, if any, prejudice had been caused by the publicity. And in *Mares v. United States, supra*, counsel similarly asked for a mistrial, but did not request a voir dire, and yet the Tenth Circuit reversed.

of a written note, as it had done earlier in its deliberations (Tr. 822-823). The court did not give counsel a proper opportunity to object, or to be heard with respect to a proper response to the juror's question, but proceeded directly to engage the juror in a colloquy, thus injecting himself into the jury's deliberations as, so to speak, a thirteenth juror; and, finally, the colloquy, in conjunction with the *Allen*-type charge which had immediately preceded it, had the coercive effect of making an inquiry into the numerical division of the jury, of isolating at least one of the jurors whose uncertainties apparently stood in the way of verdict, of attempting to dispel the reasonable doubt that the juror apparently entertained, and of coercing that juror into surrendering his reasonable doubt and acquiescing in a verdict of guilty.

Authority in this Court suggests a strong disapproval of these practices. *Rogers v. United States*, 422 U. S. 35 (1975) emphasized the importance of permitting the parties to be present in person or by counsel at all proceedings and sharply criticized the practice of giving a supplementary instruction to the jury in the absence of the parties and " 'without affording them an opportunity either to be present *or to make timely objection to the instruction*' ". *Id.* at 38 (emphasis added). The Court stated:

> Cases interpreting the Rule [R. 43, Fed. R. Crim. P.] make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that the petitioner's counsel should have been given an opportunity to be heard before the trial judge responded. *Id.* at 39.

The Court rejected the Government's contention that the error was harmless under Fed. R. Crim. P. 52(a), because the judge's indication of his willingness to accept a

guilty verdict with a recommendation of "'extreme mercy'", combined with a return of a verdict of guilty within five minutes, strongly suggested that:

> [T]he trial judge's response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise. *Id.* at 40.

No less a respected authority than *Devitt & Blackmar* indicates that, after giving supplemental instructions, the trial judge should not receive oral questions, but that the normal practice is to instruct the jury to put further questions in writing and that a continuing dialogue between the court and the jury is not desirable. The purpose of this practice is precisely to allow counsel an opportunity to object and advise the court appropriately regarding further instructions. 1 *E. J. Devitt & C. B. Blackmar, Federal Jury Practice And Instructions* § 18.13 at 603 (1977).

Finally, the solicitation of questions from the jury, after the judge had been informed that the jury was making no progress, was an open invitation to the jurors whose conscientious convictions prevented them from acquiescing in a verdict, to reveal their identity to the judge, and, because this invitation came immediately after the delivery of the *Allen*-type charge, it may well have been perceived as an order to do so. The effect of the unsolicited invitation by the judge, therefore, was to inquire into the numerical division of the jury, a practice long condemned under the authority of *Brasfield v. United States*, 272 U. S. 448 (1926).

The coercive effects of the *Allen*-type charge given by the trial judge, coupled with the coercive effects of his solicitation of oral questions and response thereto, so combined to taint and impair the integrity of the verdict that this Court should intervene and express its disapproval of that practice.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit on the questions presented herein.

Respectfully submitted,

WILLIAM JOSEPH RODGERS,
Counsel for Petitioner,
Frederick J. Otterbein.

Of Counsel:
WILLIAM A. DESTEFANO,
RICHARD M. BERNSTEIN.

Appendix.

UNITED STATES DISTRICT COURT
FOR DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Docket No. 77-0119
(Superseding Indictment)

UNITED STATES OF AMERICA

v.

FREDERICK J. OTTERBEIN,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER.

(Filed August 18, 1977)

In the presence of the attorney for the government the defendant appeared in person on August 17, 1977 with counsel Falcon B. Hawkins, Esq. and P. Michael Duffy, Esq., retained.

Plea—Not guilty.

There being a verdict of guilty returned July 1, 1977 on jury verdict as to Counts 1 thru 8, defendant has been convicted as charged of the offense of violation of Title 18, United States Code, Section 664.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because

no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby commited to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day as to Count 1; as to Counts 2, 3, 4, 5, 6, 7 & 8, imposition of institutional sentence is suspended and the defendant placed on probation for a period of two (2) years. Said probation sentence to commence upon release from committed sentence.

The Indictment filed April 19, 1977, is hereby dismissed.

/s/ CHARLES E. SIMONS, JR.,
U. S. District Judge.

Date: 8-18-77

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2287

UNITED STATES OF AMERICA,
Appellee,

v.

FREDERICK J. OTTERBEIN,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.
CHARLES E. SIMONS, JR., DISTRICT JUDGE.

Argued November 16, 1973 Decided December 8, 1978

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and PHILLIPS, Circuit Judge.

William J. Rodgers (William A. DeStefano, Richard M. Bernstein, Pepper, Hamilton & Scheetz on brief) for Appellant; David W. Elabor, Attorney, Dept. of Justice (Thomas E. Lydon, Jr., United States Attorney, Philip Wilens, Chief, Government Regulations and Labor Section, Criminal Division on brief) for Appellee.

PER CURIAM:

Convicted on eight counts of embezzling assets of an employee benefit plan, or a fund connected therewith, in

violation of 18 U. S. C. § 664, defendant appeals. We see no reversible error and we affirm.

While we think that the government's expert witness should not have been permitted to testify to his legal conclusion that the fund from which defendant made withdrawals was one which fell within the definition of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1002, and hence was protected by 18 U. S. C. § 664, no objection was lodged to the testimony and we do not perceive its receipt as plain error.* Moreover, defendant's expert was permitted to express a contrary conclusion, again without objection.

We conclude that 18 U. S. C. § 664 does not fail to give a person of ordinary intelligence fair notice of proscribed conduct. It is not, therefore, void for vagueness.

We do not think that there was any error on the part of the district court in not putting the jury on voir dire with respect to allegedly prejudicial publicity. First, we do not think that the publicity was prejudicial. The newspaper article reported only what the jury had heard in open court and it drew an inference that the jury was entitled to draw. Second, despite repeated invitations from the district court to counsel to make suggestions as to corrective action, counsel declined to request the court to do anything. We do not think that counsel may now complain of inaction.

Finally, we see no reversible error in the district court's charge to the jury. Nor was the modified *Allen* charge, given after substantial deliberation by the jury, coercive even though it was not in the form recommended

* To the extent that the testimony of the government's expert embodied legal conclusions, we think that the expert correctly stated the law. Certainly there was ample evidence, aside from the expert's testimony, from which the jury could find that the withdrawals were made from a protected fund and hence were in violation of § 664.

in United States v. Sawyers, 423 F. 2d 1335 (4 Cir. 1970). *See also* United States v. Stollings, 501 F. 2d 954 (4 Cir. 1974). It was not improper for the district court to offer to answer the jury's inquiries about legal instructions and to give that assistance when requested.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2287

UNITED STATES OF AMERICA,
Appellee,

v.

FREDERICK J. OTTERBEIN,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JUDGMENT.

Filed December 8, 1978

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2287

UNITED STATES OF AMERICA,
Appellee,

v.

FREDERICK J. OTTERBEIN,
Appellant.

ORDER.

FILED JANUARY 9, 1979

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Field, and Judge Phillips.

FOR THE COURT,

WILLIAM K. SLATE, II
Clerk

A True Copy, Teste:
WILLIAM K. SLATE, II, *Clerk*
By EMILY RUEGER
Deputy Clerk